NO. 85-2023

Supreme Court, U.S.
FILED
JUN 24 1986
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CLERK

IN THE

Supreme Court of the United States

OCTOBER 1985 TERM

LEVENCE JOHN MATTE,

Plaintiff,

versus

ZAPATA OFFSHORE COMPANY, ET AL,

Defendants, Third-Party Plaintiffs, Petitioners,

versus

TIMCO, INC., ET AL,

Third-Party Defendants, Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Supplemental Appendix of Petitioners

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DISCLOSURE PURSUANT TO U.S. SUPREME COURT RULE 28.1

Zapata Off-Shore Company is a wholly-owned subsidiary of Zapata Corporation. Subsidiaries of Zapata Off-Shore Company include Southeast Asia Rig Company, Ltd., Afcons-Zapata Off-Shore Services, Ltd., Al Muhary-Zapata, Ltd., Ugland Zapata Off-Shore A.S. and Zapata Ugland Drilling Company, Inc.

Kerr-McGee Corporation has no subsidiaries that are not wholly owned by it.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 83-1404
SECTION "C"

LEVENCE JOHN MATTE

VERSUS

ZAPATA OFFSHORE CO., ET AL.

Filed: U.S. District Court
Eastern District of LA.
January 28, 8:34 AM, 1985
Loretta G. Whyte, Clerk

MINUTE ENTRY
January 18, 1985
COLLINS, J.

DATE OF ENTRY: January 28, 1985

OPINION OF DISTRICT COURT

This matter is before the Court on motion of third-party defendants, Timco, Inc. and Royal Belge Insurance Co., seeking summary judgment on the contractual indemnity claims of defendants, Zapata Off-Shore Co. and Kerr-McGee Corp. For the reasons set forth below, the motion is hereby GRANTED.

The material facts are not disputed. Plaintiff, Levence John Matte, brought this action against Zapata and Kerr-McGee

under the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (OCSLA), and the general maritime law, for neck and shoulder injuries he allegedly sustained on March 28, 1982 while working for Timco as a casing hand on Zapata Rig No. 8, which was located on Kerr-McGee fixed Platform No. 238, about fifty miles off the Louisiana coast. The Timco casing crew, which included plaintiff, had been sent to the platform in response to a verbal work order made, on March 25, 1982, pursuant to earlier executed master service agreements. The "Master Service Agreement" between Timco and Kerr-McGee was executed on June 15, 1977; the "Master Service Contract" between Timco and Zapata was executed in December, 1981.[1] Both of these master service agreements contain provisions[2] requiring Timco to defend and indemnify the other party against suits such as the present one brought

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1. Although the Master Service Contract between Timco and Zapata is itself undated, the parties agree that it was executed in December, 1981.

2. Paragraph 6 of the Master Service Agreement between Timco and Kerr-McGee in full provides:

> Contractor hereby indemnifies and agrees to protect, hold and save Kerr-McGee and its co-lessees, if any, in the lease or leases operated by Kerr-McGee on their behalf, harmless from and against all claims, demands and causes of action of every kind and character (except sub-surface damage to reservoirs or formations) including the cost of defense thereof, arising in favor of any person, firm or organization, including but not limited to injuries to employees of Contractor, its agents, representatives or sub-contractors, employees of Kerr-McGee, its agents, representatives or sub-contractors, on account of, arising from or resulting, directly or indirectly, from the work and/or services performed by Contractor hereunder, whether on, off, or near the premises, or by conditions created thereby, and whether the same is caused or contributed to by

by Timco employees. When called upon to honor these contractual indemnity provisions Timco refused on grounds that these provisions were rendered null and void by LSA-R.S. §9:2780.[3] This third party action ensued.

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2. (Continued)

the negligence of Kerr-McGee, its agents or employees.

Paragraph 10 of the Master Service Contract between Timco and Zapata in full provides:

> CONTRACTOR agrees to release, protect, indemnify, defend and hold ZAPATA harmless from and against any and all liability, claims, demands and causes of action of every kind and character, including the cost of defense thereof, arising in favor of third parties for injury to or death of and/or loss of or damage to property arising in favor of third parties, but only if such losses are caused by CONTRACTOR or its invitees' negligence and even though such losses may have been caused or contributed to by the joint or concurrent negligence (including, but not limited to, any preexisting condition, unseaworthiness of a vessel, product liability, merchantability or other legal right of recovery) of ZAPATA or its invitees. Notwithstanding the foregoing, CONTRACTOR is not obligated to indemnify ZAPATA for ZAPATA's sole negligence causing any such loss to any third party.

3. LSA-R.S. §9:2780 provides in pertinent part:

> A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions . . . contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals . . . to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of

Although no material factual disputes exist, Zapata and Kerr-McGee contend that Timco is not entitled to judgment as a matter of law for three reasons. These three reasons are discussed individually below.

The first contention, asserted by both defendants, is that LSA-R.S. §9:2780 does not apply to this OCSLA case, via

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3. (Continued)

> **Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee . . or any independent contractor who is directly responsible to the indemnitee.**
>
> . . . .
>
> **I. This Act shall apply to certain provisions . . . designed to provide indemnity to the indemnitee for all work performed between the indemnitor and the indemnitee in the future. This specifically includes what is commonly referred to in the oil industry as master or general service agreements or blanket contracts in whatever form . . . . The provisions of this Act shall not apply to a contract providing indemnity to the indemnitee when such contract was executed before the effective date of this act [September 11, 1981] and which contract governs a specific terminable performance of a specific job or activity . . . .**

43 U.S.C. §1333(2)(A),[4] as *Rodrigue*[5] surrogate federal law, because it is inconsistent with existing federal common law, which defendants contend permits indemnification for the indemnitee's own negligence. The Fifth Circuit's recent decision in *Smith v. Shell Oil Co.*, Nos. 82-4364, 83-4056, slip op. at 947 & n.9 (5th Cir. Nov. 27, 1984), which expressly adopted LSA-R.S. §9:2780 as surrogate federal law but found it retroactively inapplicable under the facts of that case, clearly establishes that defendants' first contention is meritless. *See also Mills v. Zapata Drilling Co.*, 722 F.2d 1170 (5th Cir. 1983).

The second contention, asserted by Kerr-McGee only,[6] is that LSA-R.S. §9:2780, which became effective September 11, 1981, cannot constitutionally be applied retroactively to impair the indemnity provision contained in Kerr-McGee's June 15, 1977 Master Service Agreement with Timco. The Court's research has revealed four cases in which the deciding court refused to apply LSA-R.S. §9:2780 retroactively to

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4. 43 U.S.C. §1333(2)(A) provides in pertinent part:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws . . . the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States . . . .

5. *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969).

6. Zapata does not assert this contention concerning retroactive application of LSA-R.S. §9:2780, because it entered into its Master Service Contract with Timco in December, 1981, three months after the effective date of the statute.

nullify indemnity provisions.[7] All of those cases have one fact in common with the present case – the master service agreement, or its equivalent, was entered into prior to the effective date of LSA-R.S. §9:2780.[8] However, all of those cases are factually distinguishable from the instant case in one critical respect – only in this case was the specific job contract (*i.e.*, the verbal work order) entered into *after* the effective date of LSA-R.S. §9:2780.[9] Thus, the Court concludes that only in this case is the statute operating *prospectively* to prevent the operation of a contra bones mores indemnity provision that is part of a contract entered

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7. *Smith v. Shell Oil Co.*, Nos. 82-4364, 83-4056, slip op. at 947-48 (5th Cir. Nov. 27, 1984); *Cossey v. Atlantic Richfield Co.*, No. 82-3173 (E.D. La. May 4, 1983) (minute entry denying motion for summary judgment based on LSA-R.S. §9:2780) (attached to Timco's *Memorandum In Support of Motion for Summary Judgment*); *Tobin v. Gulf Oil Corp.*, 535 F. Supp. 116 (E.D. La. 1982); *Great Atlantic Insurance Co. v. Martin Services International, Inc.*, 445 So.2d 146, 148 (La. 3d Cir. 1984).

8. In *Smith*, "the blanket service agreement [containing the indemnity provision] was entered into in May, 1980." *Smith*, slip op. at 948. In *Tobin*, the workover contract containing the indemnity provision was entered into on December 13, 1979. In *Great Atlantic*, the insurance policy amendment giving rise to the insurer's indemnity exposure was executed on March 17, 1980. Finally, the minute entry in *Cossey* gives no specific date but expressly states that the master service contract was entered into prior to September 11, 1981, the effective date of LSA-R.S. §9:2780.

9. In *Smith*, the injury occurred in November, 1980 (obviously the specific job contract must have been entered into prior to the injury). In *Cossey*, though no specific date is given, the Court explicitly stated that "the specific job contract (the phone call) [was] entered into prior to the effective date of [LSA-R.S. §9:2780]." In *Tobin*, the injury occurred on June 4, 1980. Finally, in *Great Atlantic*, the injury occurred on March 24, 1980.

into *after* the effective date of the statute.[10] Such a prospective application of the statute is entirely constitutional. Accordingly, the Court rejects this second contention.

Finally, the third contention, asserted by Zapata alone,[11] is that the Court should give effect to the choice of law provi-

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10. Implicit in the Court's conclusion is the underlying conclusion that a specific job contract was entered into on March 25, 1982, which, though consisting of both the master service agreement and the verbal work order, was formed on the date of the verbal work order, *i.e.*, after the effective date of LSA-R.S. §9:2780. The decision cited by Kerr-McGee, *First National Mortgage Corp. v. Manhattan Life Insurance Co.*, 360 So.2d 264 (La. 4th Cir. 1978), is simply not to the contrary.

In *First National*, the Court said:

> Each mortgage loan agreement was executed pursuant to the terms of the servicing agreement. Thus, it can be said that there existed numerous contracts between the parties, consisting of both the principal servicing agreement and all of the separate loan agreements.

Id. at 268. That language accords with this Court's determination that the specific job contract consisted of both the June 15, 1977 master service agreement and the March 25, 1982 verbal work order. More importantly though, that language has no bearing whatsoever on this Court's determination that the formation date of the specific job contract was March 25, 1982, despite the fact that it incorporated terms from an earlier agreement.

11. Only Zapata's contract with Timco expressly provides for the application of the General Maritime Law. *See* paragraph 23 of Zapata's Master Service Contract with Timco. Thus, only Zapata contends that the choice of law provision in its contract should be given effect and the General Maritime Law applied. However, Kerr-McGee also argues that the General Maritime Law should govern its contract with Timco, because most of the work done by Timco pursuant to that contract was performed on vessels. With Kerr-McGee's contention, the Court strongly disagrees. That Timco may have performed most of its work for Kerr-

sion in its Master Service Contract with Timco, which states that "the law governing the Agreement shall be the General Maritime Law." Timco/Zapata *Master Service Contract* at Paragraph 23. The Court concludes that it must declare the contractual choice of law provision void as against public policy, *see Great Atlantic*, 445 So.2d at 148, because LSA-R.S. §9:2780 is an express legislative prohibition[12] against indemnity provisions, such as the one at issue herein, that exonerate the indemnitee from its own negligence.[13] Accordingly, the Court rejects this final contention.

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11. (Continued)

McGee on vessels is irrelevant. The specific job contract, pursuant to which Timco was engaged at the time of plaintiff's alleged injury, was performed on a fixed platform and is governed by Louisiana law, not maritime law.

12. *See Delhomme Industries, Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049, 1058-59 (5th Cir. 1982) (discussing at length Louisiana rule on judicial invalidation of contractual choice of law provisions for public policy reasons). The Court finds that Timco has met its burden of establishing that the choice of law provision in its contract with Zapata is void as against public policy under the rule as propounded in *Delhomme* and the cases cited therein. *See also Burbank v. Ford Motors*, 703 F.2d 865 (5th Cir. 1983).

13. The language of the statute itself and the three transcripts of subcommittee hearings, attached to defendants' initial opposition memorandum, clearly indicate that the legislature was attempting to enhance the safety of oil field workers, as much as it was attempting to reduce the insurance burden of oil field service companies, in deciding to declare such indemnity provisions void as against public policy. Paragraph A of the statute states that "[t]he legislature finds that an inequity is foisted on certain contractors *and their employees*" (emphasis added) by such indemnity provisions. In addition, at numerous places throughout the three transcripts of subcommittee hearings on this issue legislators and testifying witnesses discussed such indemnity provisions as being contrary to public policy and morals. Perhaps most

In summation, the Court finds that there are no issues of material fact and Timco is entitled to judgment as a matter of law. Accordingly, summary judgment in favor of Timco is appropriate.

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13. (Continued)

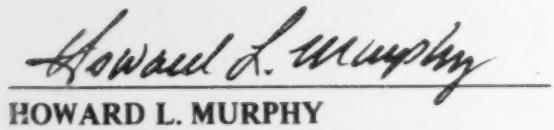
importantly though are the concerns that such indemnity provisions may well cause the exonerated indemnitee to become lax in its concern for the safety of oil field workers. *See, e.g.*, pp. 41 & 40 of the transcript of the October 29, 1980 subcommittee meeting, and pp. 55 & 56 of the transcript of the February 10, 1981 subcommittee meeting. This concern for worker safety, which found its way into the language of paragraph A of the statute, clearly demonstrates that LSA-R.S. §9:2780 is an express legislative statement of a fundamental policy of this state against such indemnity provisions.

s/s Robert F. Collins

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing supplemental appendix of petitioners has been served on respondents through their counsel of record, Edward F. LeBreton, III, of Phelps, Dunbar, Marks, Claverie & Sims, 30th Floor, Texaco Building, 400 Poydras Street, New Orleans, Louisiana 70130, by placing a copy of same in the United States mail, postage prepaid and properly addressed, this 23rd day of June, 1986.



HOWARD L. MURPHY